Arbitrating the Great Writ: Resolving Federal Habeas Corpus Disputes Through Arbitration

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I. INTRODUCTION

The "Great Writ"—or, as it is most commonly known, the writ of habeas corpus—remains a vital constitutional mechanism for redressing inequities, injustices, and procedural errors in the criminal adjudicatory process.[1] In modern American jurisprudence, courts employ the remedy of habeas corpus to ensure the legality of a prisoner's detention.[2] Indeed, the prisoner's ability to petition for the judicial reassessment of the constitutionality of her criminal sentence provides an indispensable check on the American judicial system. Given the human error and prejudice that can at times be pervasive in criminal adjudication, such a check remains essential.[3]

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[1] *See* Zechariah Chafee, Jr., *The Most Important Human Right in the Constitution*, 32 B.U. L. REV. 143, 144 (1952) (asserting that "[t]his one human right is the safeguard for other human rights."). After illustrating the history of modern habeas corpus, Chafee concludes that the writ of habeas corpus provides for other constitutional guarantees to be realized, and provides prisoners with an avenue towards justice. *See generally id. See also* Emanuel Margolis, *Habeas Corpus: The No-Longer Great Writ*, 98 DICK. L. REV. 557, 562 (1994) (referring to habeas corpus as "probably the most precious of all our constitutional liberties"). The United States Supreme Court has observed that the writ of habeas corpus

> has been the common law world's 'freedom writ' by whose orderly processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free. We repeat what has been so truly said of the federal writ: 'there is no higher duty than to maintain it unimpaired,' . . . and unsuspended, save only in the cases specified in our Constitution.

Smith v. Bennett, 365 U.S. 708, 712–13 (1961) (quoting Bowen v. Johnson, 306 U.S. 19, 26 (1939)).

[2] *See* Boumediene v. Bush, 128 S.Ct. 2229, 2242–43 (2008) (citing Black's Law Dictionary 728, "habeas corpus" (8th ed. 2004)).

[3] For a discussion of the pervasiveness of human error in capital sentencing, and in criminal sentencing generally, see Adam Hime, *Life or Death Mistakes: Cultural Stereotyping, Capital Punishment, and Regional Race-Based Trends in Exoneration and Wrongful Execution*, 82 U. DET. MERCY L. REV. 181, 216 (2005) (explaining various

Nevertheless, modern federal habeas corpus process is flawed.[4] The Supreme Court, under Chief Justices Burger and Rehnquist [hereafter referred to as the "Burger-Rehnquist Court"], and the lower federal courts which have been informed and guided by their holdings, implemented a complex set of procedural hurdles that have restricted the accessibility at the review of state prisoners' habeas petitions in federal court, irrespective of the substantive merit of such claims.[5] These procedural hurdles, working in concert with the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),[6] have clouded the constitutional guarantee of federal habeas corpus review for state prisoners seeking to advance their habeas petitions to federal court.[7] Additionally, the federal habeas corpus process is uneconomical because courts are frequently flooded with habeas petitions brought by federal and state prisoners.[8] These two identifiable flaws in the

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sources of wrongful conviction in criminal cases nationwide and largely attributing these wrongful convictions to "systemic and culture-based human error").

[4] *See* Jerome J. Kaharick, Comment, *The Reform of Federal Habeas Corpus in Capital Cases*, 29 DUQ. L. REV. 61 (1990) (noting several general flaws and problems with the federal habeas corpus system—in particular, when dealing with post-conviction review of capital sentences—and suggesting a model of reform to improve the federal habeas corpus process).

[5] The U.S. Constitution mandates, per Article I, Section 9, Clause 2, that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the Public Safety may require it." U.S. CONST. art. I, § 9 cl. 2. For a particularly scathing critique of the procedural developments restricting habeas rights, see Margolis, *supra* note 1, at 572–77 (arguing that the federal courts—in particular the Rehnquist-Burger Court and subsequent lower federal courts—have continuously restricted the ability for prisoners to succeed in habeas corpus procedures, thereby generating a "bleak and deteriorating picture" of modern federal habeas corpus doctrine). Due to its relatively brief tenure thus far, this note does not analyze the Roberts Court's habeas jurisprudence, but rather reflects solely on the procedural barriers implemented over decades by the Burger and Rehnquist Courts.

[6] 28 U.S.C. § 2244(b)(2) (1996).

[7] Margolis, *supra* note 1, at 567–68 (suggesting that in the wake of the Supreme Court's landmark opinion in *Stone v. Powell*, 428 U.S. 465 (1976), the doctrine of federal habeas corpus has "become a matter of judicial discretion rather than constitutional imperative").

[8] Although the amount of prisoner petitions has decreased over recent years, habeas corpus claims still comprise a large portion of the federal docket in U.S. district courts. *See* Administrative Office of the United States Courts, Fiscal Year 2006 Caseloads Remain at High Levels, http://www.uscourts.gov/ttb/2007-03/fiscal/index.html (last visited March 13, 2009) (providing statistics of the amount of federal habeas corpus claims brought into U.S. District Court); *see also* Rose v. Lundy, 455 U.S. 509 (1982) (requiring state prisoners to aggregate their claims before bringing them to federal court for appellate review, based in part upon the sheer number of claims brought by state

modern federal habeas corpus process—a state prisoner's procedural obstacles in attaining federal habeas corpus review and the overwhelming deluge of habeas petitions by inmates—are often interrelated.[9] Indeed, the sheer number of claims brought to federal court has been cited as justification by judges and legislators to initiate sweeping reforms curtailing the prisoner's ability to successfully bring such claims to federal court.[10]

A systemic overhaul of federal habeas corpus procedure is imperative if the Great Writ is to regain its teeth as a viable avenue of redress for prisoners who have been inequitably or erroneously sentenced.[11] As a result, this note briefly documents the decline of the modern federal habeas doctrine, and suggests the use of *arbitration* as a lean and efficient mechanism for reform of federal habeas procedure.[12] An arbitral tribunal responsible for

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prisoners); Engle v. Isaac, 456 U.S. 107, 128 (1982) (acknowledging the "special costs on our federal system" that the immense number of federal habeas corpus claims were generating as a dispositive reason to limit the access that a state prisoner may have to a proper federal review of his habeas corpus petition).

[9] Brian M. Hoffstadt, *How Congress Might Redesign a Leaner, Cleaner Writ of Habeas Corpus*, 49 DUKE L.J. 947 (2000) (arguing that regardless of the existing complex procedural hurdles impeding the review of a state inmate's habeas corpus claim in federal court, judges and legislators are intent on perpetuating the additional restrictions to federal habeas corpus review to limit the prevalence of these claims in federal court). Hoffstadt recognizes the deteriorated state of the modern federal habeas doctrine in light of its explicit constitutional guarantees, and argues for the re-creation of a habeas process that sheds these procedural hurdles while promoting efficiency and protection of fundamental rights. *Id.*; *see also* Barry Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247, 255 (1988) (suggesting that the procedural impediments in the way of effective habeas proceedings instituted by federal courts have led to a "doctrinal confusion" in habeas law).

[10] *See generally* Hoffstadt, *supra* note 9 (noting both judicial and congressional efforts to curtail the number of habeas corpus claims advanced to federal court for efficiency purposes).

[11] *See* Peyton v. Rowe, 391 U.S. 54, 58 (1968) ("The writ of habeas corpus is a procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny. Where it is available, it assures among other things that a prisoner may require his jailer to justify the detention under the law.").

[12] Federal courts have widely recognized and lauded the usefulness of arbitration. *See, e.g.*, Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (agreeing that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration"); Ganton Technologies, Inc. v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., U.A.W., Local 627, 358 F.3d 459, 462 (7th Cir. 2004) (observing arbitration as an "efficient and cost-effective method of resolving . . . disputes"); Com-Tech Assocs. v. Computer Assocs. Int'l., Inc., 938 F.2d 1574, 1578 (2d Cir. 1991) (recognizing that the purpose of arbitration is "that disputes be resolved with dispatch and with a minimum of expense"). Further, the

adjudicating federal habeas petitions would relieve the overwhelmed dockets of federal courts while providing prisoners with an efficient and impartial federal habeas review process that would produce binding judgments.[13] Implementing an arbitration system to assess habeas petitions may also appease those in support of procedural limitations on federal habeas review, as well as in favor of the AEDPA's codification of additional procedural restrictions.[14] This note proposes that the arbitral habeas tribunal have at its foundation a roster of "expert" arbitrators. These arbitrators should be particularly proficient and skilled in evaluating the complex nature of habeas claims and the intertwined constitutional issues that affect and inform the analysis of such disputes.[15]

Additionally, this note supplements this relatively narrow prescription to the federal habeas process by acknowledging the broader transformative effects that various methods of alternative dispute resolution—particularly arbitration—have had on legal procedures across an array of substantive

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economical nature of arbitration has been observed and lauded in a substantial amount of commentary. *See, e.g.*, Zela G. Claiborne, *Constructing a Fair, Efficient, and Cost-Effective Arbitration*, 26 ALTERNATIVES TO HIGH COST LITIG. 186 (Nov. 2008) (recognizing the potential that arbitration has to provide claimants with an efficient alternative to trial).

[13] *See* Roger Haydock, *Arbitration: Fair For Consumers*, FORBES, Oct. 31, 2007, *available at* http://www.forbes.com/2007/10/30/arbitrate-courts-debtors-oped-cx_rth_1031arbitrate.html (concluding that given its efficiency, time-saving qualities, and protection of rights, arbitration proceedings are very beneficial).

[14] *See generally* John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259 (2006) (documenting the various restrictions imposed upon state prisoners with habeas claims under the AEDPA and discussing the impact of these restrictions). Blume notes that finality of decisions upon direct review was a significant impetus in the creation of AEDPA and the restrictive provisions therein, but that "[t]he pursuit of finality, however, has come at a significant cost. The new statute of limitations [for successfully advancing habeas corpus claims to federal court] has deprived thousands of potential habeas petitioners of any federal review of their convictions, and in some cases, their death sentences." *Id.* at 289.

[15] It has been suggested that when dealing with particularly technical or complex areas of law, experts in the particular area of law informing the dispute can and should be utilized to resolve such disputes. *See* Gray H. Miller & Emily Buchanen Buckles, *Reviewing Arbitration Awards in Texas*, 45 HOUS. L. REV. 939, 961 (2008) ("One of the benefits of arbitration, although not mentioned in any legislative history that clearly exists, is detailed knowledge of the parties' business context in the person of an industry expert on the arbitration panel."); John Berryhill, Ph.D., *Public Interest Considerations in Private Resolution of Patent Disputes* (1999), *available at* http://www.johnberryhill.com/patdis.html (explaining that given the technical and complex nature of patent disputes, finding expert arbitrators to oversee the resolution of these disputes would be a positive influence on the resolution of such disputes).

areas of law, and throughout society.[16] This note argues on behalf of arbitrating federal habeas corpus petitions by acknowledging a nexus between habeas corpus and other areas of law in which the use of arbitration is particularly prevalent.[17] In light of these observations, if federal habeas petitions can be arbitrated in an efficient and practical manner, the habeas doctrine would undergo a stabilizing transformation.[18] Thus, in the interest of making federal habeas corpus procedure the rights-protective mechanism that

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[16] *See generally* Kenneth F. Dunham, *Sailing Around Erie: The Emergence of a Federal General Common Law of Arbitration*, 6 PEPP. DISP. RESOL. L.J. 197 (2006) (analyzing the history and emergence of arbitration in both state and federal courts, and over a wide array of legal areas). Dunham eventually concludes that "federal case law favors the enforcement of binding pre-dispute arbitration clauses, and there is no indication by the courts or Congress that the rule of law in this area is likely to change anytime soon." *Id.* at 227.

[17] *See generally id.*

[18] This note does not purport to exact a quick and fast remedy to the problems that plague the modern federal habeas corpus review process. While extensive commentary has observed the problems with federal habeas corpus review, a limited collection of work exists prescribing substantive or procedural changes to the system. However, some opinions on how federal habeas corpus procedure may be reworked in the future, or should be viewed and analyzed, have been articulated. *See* Erwin Chemerinsky, *Thinking about Habeas Corpus*, 37 CASE. W. RES. L. REV. 748 (1987) (providing views on how the main issues confronting habeas jurisprudence should be appropriately analyzed); Hoffstadt, *supra* note 9 (providing a potentially workable theory as to how the federal writ of habeas corpus can assure justice to wrongly incarcerated state prisoners, while mitigating the arduous procedural roadblocks that stand in the way of proper habeas review); Brian Hoffstadt, *The Deconstruction and Reconstruction of Habeas*, 78 S. CAL. L. REV. 1125, 1220 (2005) [hereafter "Hoffstadt *Deconstruction and Reconstruction*"] (arguing that "habeas is an anomaly and it should be reconstructed, one way or the other, to bring greater consistency and rationality to the law of federal courts"); Adam N. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA's Standard of Review Operate After Williams v. Taylor?*, 2001 WIS. L. REV. 1493 (2001) (suggesting that after the Supreme Court's ruling in *Williams v. Taylor*, 529 U.S. 362 (2000), federal courts need to reassess their review process of state habeas decisions, and that *Williams* is just the beginning of the debate as to how federal courts should apply the provisions of the AEDPA to its review of state court rulings). No commentary or analysis to this date has addressed the potential effect of alternative dispute resolution methods on federal habeas corpus practice. This note should therefore be viewed as merely a starting point for the conversation. The position taken herein is an acknowledgement of the problems with the modern federal habeas corpus process, but also an attempt to look outside the boundaries that have traditionally framed the debate over the most efficacious approach to reviewing federal habeas petitions.

the Constitution envisions,[19] implementing a federal arbitration tribunal to hear federal habeas petitions, and issue enforceable, binding decisions precluding further appeal to federal trial courts, would be a viable means of resolving these disputes.[20]

Part II of this note will outline criticisms of current federal habeas corpus procedure, as articulated in a considerable amount of commentary and case law. Part II will identify the procedural hurdles standing in the way of habeas petitioners seeking access to federal court, implemented and adopted primarily by the Burger-Rehnquist Court and subsequent lower federal courts, and augmented by the enactment of the AEDPA. Part III will propose a workable model for arbitrating federal habeas corpus claims. This section will acknowledge comparative studies of arbitration and litigation, and note the various advantages of inducing arbitration proceedings for factual or constitutional disputes, such as habeas corpus claims. Part III will also provide a nexus between arbitration in federal habeas corpus and arbitration procedures currently utilized or proposed in other areas of law. Lastly, Part IV will conclude with a summation of the decline of rights protection in federal habeas corpus review, the current state of federal habeas procedure, and how a federal habeas corpus arbitration system could be a much-needed procedural overhaul of the current federal habeas corpus process.

II. THE NOT-SO-GREAT WRIT: THE DOWNFALL OF THE MODERN FEDERAL HABEAS CORPUS DOCTRINE

Since the Supreme Court's 1976 ruling in the seminal case of *Stone v. Powell*,[21] limitations on federal habeas corpus access for state prisoners have become increasingly palpable and notably more sweeping.[22] Indeed, federal

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[19] U.S. CONST. art. I, § 9 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[20] *Id.*

[21] Stone v. Powell, 428 U.S. 465 (1976).

[22] *See generally* Margolis, *supra* note 1 (providing a comprehensive history of the Supreme Court's gradual transition into restrictive policies overseeing federal habeas corpus petitions from state prisoners, thereby constricting the applicability of habeas relief to those prisoners); *see also* Hoffstadt, *supra* note 9, at 960 (explaining that "the interaction of the doctrines of exhaustion, procedural default, and abusive petitions has created a very elaborate set of procedural hurdles that must be negotiated before a state prisoner's claims may be heard by a federal court on habeas"). Hoffstadt attributes the creation and implementation of these hurdles to the Burger-Rehnquist Court's reliance upon state procedure and subsequent state ruling, deference to state procedural rules and

courts, through a litany of case law, have constructed and applied an elaborate set of procedural hurdles through which a state prisoner, often with insufficient legal knowledge or resources, must navigate in order to be granted proper review.[23] Specifically, in what has been aptly described as a "procedural thicket,"[24] an assortment of procedural doctrines, largely created by the Burger-Rehnquist Court, contravenes Congress's explicit statutory language expanding the federal review of habeas corpus petitions to include state prisoners,[25] as well as the liberal guarantee of the United States Constitution.[26] Moreover, with the passage of the AEDPA in 1996, these procedural hurdles have been strengthened, as increased restrictions standing in the way of prisoners' habeas claims have been codified.[27]

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guidelines at the expense of the substantive merit of a petitioner's habeas petition, and concern for finality in judgment and efficient docket maintenance. *Id.* at 966–67.

[23] Hoffstadt, *supra* note 9, at 960 ("In practical terms . . . these procedural hurdles end up precluding or greatly delaying resolution of the merits in a substantial number of cases."); *see also, e.g.*, Teague v. Lane, 489 U.S. 288 (1989) (creating a general rule against retroactive application of new criminal proceeding rules to cases that had already been heard in state tribunals); Anderson v. Harless, 459 U.S. 4 (1982) (affirming the vitality of the exhaustion principle, and holding that habeas claims must be fully presented in state court prior to petitioning for federal review of such claims); Wainwright v. Sykes, 433 U.S. 72 (1977) (establishing the modern procedural default doctrine, which restricts federal courts from considering issues raised in a habeas petition that have been defaulted in state court on independent and adequate state procedural grounds, unless the petitioner can show "cause" for the procedural default, and "prejudice" which attributed to the default).

[24] Hoffstadt, *supra* note 9, at 954.

[25] 28 U.S.C. § 2254(a) (1867) (authorizing habeas corpus petitions for any violation of "the Constitution or laws or treaties of the United States"). Furthermore, it is important to note that the Supreme Court's 1963 case of *Fay v. Noia*, 372 U.S. 391 (1963) was the most expansive habeas ruling issued by the Court. *See* Margolis, *supra* note 1, at 565. In *Fay*, the Court upheld an issuance of the writ of habeas corpus to a state prisoner, regardless of the fact that the petitioner had failed to raise his constitutional claim in state court. The Court in *Fay* held that federal courts were not required to deny habeas for a prisoner who intentionally failed to exhaust state remedies. *Fay*, 372 U.S. at 439. Later, *Fay* was overturned by *Wainwright*'s sweeping establishment of the procedural default doctrine. *Wainwright*, 433 U.S. 72.

[26] U.S. CONST. art. I, § 9 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). By "liberal," I am not referencing the modern political ideological spectrum, but rather the liberty-centric guarantees of the Constitution.

[27] 28 U.S.C. § 2254 (1996); *see also* Roger Berkowitz, *Error-Centricity, Habeas Corpus, and the Rule of Law as the Law of Rulings*, 64 LA. L. REV. 477 (2004) (providing a comprehensive analysis of how the AEDPA has affected the Supreme Court's habeas jurisprudence and has accordingly exacerbated the narrowing of access into federal courts

A. *Procedural Hurdles*

There are three principal—and most restrictive—procedural barriers to review of federal habeas corpus petitions established and handed down by the Supreme Court: 1) the exhaustion doctrine; 2) the procedural default rule; and 3) the successive petitions and abuse of the writ doctrine.[28] As detailed below, these barriers have directly resulted in the rejection of an undue amount of state prisoners' federal petitions for habeas corpus review.

1. *The Exhaustion Doctrine*

The first and oldest of the barriers to federal habeas review is the exhaustion doctrine, which requires a state prisoner to fully exhaust state remedies prior to bringing his habeas claim to federal court.[29] In exhausting state remedies, a state prisoner must present the entirety of his federal constitutional claims in state court prior to filing a federal habeas petition.[30] Unless these state remedies are exhausted, a state inmate's federal habeas petition will be denied, and the claim will be returned to state court.[31] The

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for habeas petitioners that had already been implemented by the Burger-Rehnquist Court). The passage of AEDPA is notable for strengthening the judicial precedent already in place, and compounding the judicially-created restrictions to federal habeas review.

[28] Hoffstadt, *supra* note 9, at 954 (explaining the "procedural thicket" regarding the administration of federal habeas corpus review, perpetually augmented by the Supreme Court since *Stone v. Powell*). Hoffstadt further explains that these doctrines "regulate habeas procedure or otherwise affect the legal or practical availability of the writ." *Id.*

[29] *See Anderson*, 459 U.S. at 6 (holding that "28 U.S.C. § 2254 requires a federal habeas petitioner to provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional [habeas] claim") (citing Picard v. Connor, 404 U.S. 270, 276–77 (1971)); *see also* Hoffstadt, *supra* note 9, at 954–55 (noting that the "doctrine seeks 'to minimize friction between our federal and state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights.' Given this purpose, a prisoner need not 'exhaust his state remedies' if 'there is an absence of available State corrective process' or if 'circumstances exist that render such process ineffective to protect the rights of the [habeas] applicant'") (citing Duckworth v. Serrano, 454 U.S. 1, 3 (1981) (per curiam), as well as the statutory language of 28 U.S.C. § 2254(b)(1)(B)). The Court in *Duckworth* held that although the fact that defendant's ineffective counsel was a clear violation of the defendant's right to a fair trial, it did not permit the habeas claim to be reviewed by a federal court without exhaustion of state remedies. *Duckworth*, 454 U.S. at 4–5.

[30] *Anderson*, 459 U.S. at 6; Brown v. Allen, 344 U.S. 443, 447 (1953) (holding that "an applicant [for federal habeas corpus review] is barred unless he has exhausted the remedies available in the courts of the State").

[31] Hoffstadt, *supra* note 9, at 954.

exhaustion requirement is both codified in the AEDPA and widely recognized by federal courts.[32]

2. *The Procedural Default Rule*

In expanding the scope of and building upon the exhaustion doctrine, the Supreme Court has held that not only must a prisoner exhaust state remedies prior to petitioning for writ of habeas corpus in federal court, but the Court should require that "he has *properly* exhausted those remedies . . ."[33] This hurdle is known as the procedural default rule, and was initially established and implemented by the Supreme Court in *Wainwright v. Sykes*.[34] The procedural default rule requires that federal courts honor state procedural rules, and if a state habeas petitioner does not properly adhere to state procedure, that inmate's claim will subsequently be denied by the federal court.[35]

State procedural rules usually require a state prisoner to raise all possible habeas claims at once and at the earliest time possible.[36] Thus, the procedural default rule, acting in concert with the exhaustion doctrine, has a particularly prohibitive effect. If a state prisoner is found to have failed to exhaust state remedies, and is directed back to state court to introduce any additional unexhausted claims, that prisoner will likely be found to have violated the

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[32] 28 U.S.C. § 2254(b)(1)(A)–(B) (1996) (providing that "[a]n application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State; or there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant"); *see also Picard*, 404 U.S. at 275 (recognizing that federal courts have "consistently adhered to [the exhaustion doctrine]," and holding that "once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied").

[33] Woodford v. Ngo, 548 U.S. 81, 92 (2006) (emphasis in original) (citing O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999)).

[34] Wainwright v. Sykes, 433 U.S. at 84, 87–91 (1977) (rejecting the Court's sweeping language in *Fay v. Noia*, "which would make federal habeas review generally available to state convicts absent a knowing and deliberate waiver of the federal constitutional contention," and adopting the procedural default rule, thereby "making the state trial on the merits the 'main event,' so to speak, rather than a 'tryout on the road' for what will later be a determinative federal habeas hearing").

[35] Hoffstadt, *supra* note 9, at 956.

[36] *Id.*

state procedural rule of raising all claims together at the earliest time.[37] Thus, the prisoner will have his claims procedurally defaulted for not raising all of them at one time, and the state court will likely refuse to hear the claims.[38] Therefore, by simply failing to exhaust state remedies, the prisoner will be procedurally defaulted and habeas review at the federal level will be permanently unavailable to him, as opposed to having the option to return to state court to amend his mistake.[39] In essence, any and all future remedial measures can easily be expropriated by these procedural hurdles, regardless of the substantive merit of a habeas claim.[40]

Additionally, in further constricting this window of opportunity for state prisoners, the Supreme Court held that in order for a court to actually reach the substantive merit of a petitioner's claim, the state inmate must show "actual prejudice as a result of the alleged violation of federal law" or "that failure to consider [the federal] claims will result in a fundamental miscarriage of justice."[41] This "cause and prejudice" standard has thereby established a heightened burden of proof for a petitioning prisoner.[42] The cause and prejudice standard compounds the procedural default rule and

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[37] *Id.* at 955–56 (observing the paradox that "[a] prisoner returning to state court years after he is convicted in order to exhaust a federal claim is unlikely to be able to satisfy these procedural rules," although "the petitioner in this situation has technically exhausted his state remedies because there are no further state remedies to exhaust—they are all foreclosed to him"). Hoffstadt acknowledges the complexity with which the Supreme Court has implemented these restrictions upon state prisoners; restrictions which may bar the inmate from ever having his petition properly reviewed. *Id.* at 960.

[38] *Id.*

[39] *See generally Wainright*, 433 U.S. 72 (holding that federal habeas corpus review is unavailable for claims previously barred or procedurally defaulted in state court for violation of state procedural rules).

[40] Hoffstadt, *supra* note 9, at 954–55.

[41] Coleman v. Thompson, 501 U.S. 722, 750 (1991) (quoting Murray v. Carrier, 477 U.S. 478 (1986)); *see also* Hoffstadt, *supra* note 9, at 957 (observing that the "actual prejudice" standard has since been followed very rigidly by federal courts, resulting in a potentially insurmountable obstacle for state inmates seeking to have their habeas petitions reviewed in federal court).

[42] *See* United States v. Frady, 456 U.S. 152, 170 (1982) (holding that the petitioner failed to show actual prejudice to his legal case resulting from the errors of which he complained, as petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his trial with error of constitutional dimensions"); Engle v. Isaac, 456 U.S. 107 (1982) (finding no cause for defaults based on procedural error at the state level, and thus rejecting petitioner's claim for review of his petition for habeas corpus).

engenders a federal habeas doctrine in which the denial of an inmate's habeas claim regardless of legal merit has become increasingly prevalent.[43]

3. *Abuse of the Writ (Successive Petitions) Doctrine*

In *McCleskey v. Zant*,[44] the Supreme Court adopted the doctrine of "abuse of the writ," which requires a habeas petitioner to bring all his federal claims in the *first* petition to federal court and punishes petitioners for attempting to bring successive petitions.[45] The petitioner does not have to deliberately attempt to bring successive petitions for abuse of the writ to bar his federal petition from review; rather, by accidentally omitting a claim a petitioner can be fully barred from federal habeas review.[46] The interplay of these aforementioned procedural hurdles with the advent of abusive petitions results in a fundamentally diminished Great Writ.[47] As if to amplify the flaws of this system, these obstacles have been rigidly and narrowly applied by federal courts, resulting in systemic repudiation of state prisoners' federal

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[43] Margolis, *supra* note 1, at 570.

[44] McCleskey v. Zant, 499 U.S. 467 (1991).

[45] *Id.* at 489; *see also* Margolis, *supra* note 1, at 575–76 (summarizing the *McCleskey* decision, and noting that the abuse of writ doctrine, as a result of *McCleskey*, is now governed by the cause and prejudice standard handed down in *Wainwright v. Sykes*). This exemplifies that the federal courts have combined these procedural barriers to create an interdependent web of constraints on habeas liberties. Indeed, Margolis postulates that with *McCleskey*, "the zeal of the Rehnquist majority to erect major roadblocks in the path of habeas corpus petitioners became transparent." *Id.* at 576.

[46] *McCleskey*, 499 U.S. at 489 (1991) (holding that "a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice"). Thus, even if the failure to raise a habeas claim is purely accidental, an inmate's entire petition can be dismissed for abuse of the writ. *Id.*

[47] *See* Hoffstadt, *supra* note 9, at 960 ("[T]he interaction of the doctrines of exhaustion, procedural default, and abusive petitions has created a very elaborate set of procedural hurdles that must be negotiated before a state prisoner's claims may be heard by a federal court on habeas."). To further compound these hurdles, the Court in *Rose v. Lundy*, 455 U.S. 509 (1982) adopted a rule of "total exhaustion," which maintains that a petition for habeas containing both exhausted and unexhausted claims must be dismissed *entirely*. *Id.* at 522.

habeas rights.[48] Further, these hurdles have unjustly been applied often without consideration of the merit of an inmate's legal claims.[49]

The Burger-Rehnquist Court rationalized the narrowing of this doctrine through three main justifications: finality of judgment, respect for federalism, and scarcity of judicial resources.[50] While finality of state court judgments may be a desirable goal in principle, this rationale has manifested in an uncompromising rigidity in the Supreme Court's habeas jurisprudence. Indeed, this judicial policy has resulted in the deflection of prisoners' claims of newfound evidence, incompetent counsel, and other procedural shortcomings for which federal habeas corpus review is constitutionally mandated.[51] Likewise, traditional principles of comity and federalism—that the constitutional rights of all citizens are to be protected, whether in federal or state courts—have been used by the Burger-Rehnquist Court as a basis for rationalizing its constriction of federal habeas accessibility to state inmates and for deferring to state procedural rules when denying petitions.[52]

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[48] *See* Margolis, *supra* note 1, at 584–85 (observing that "[u]nder the general rubric of 'abuse of the writ,' the Court has developed a habeas jurisprudence replete with minefields such as 'cause and prejudice,' non-retroactivity of new constitutional principles, and proof of 'actual innocence'").

[49] Hoffstadt, *supra* note 9, at 961.

[50] *See* Margolis, *supra* note 1, at 585 (citing these three justifications as "[t]he reasons most frequently given for the Court's retreat from its earlier supportive and expansive view of the Great Writ," and accordingly, providing a comprehensive explanatory analysis of each of these three justifications).

[51] *Id.* at 587; *see also* Herrera v. Collins, 506 U.S. 390 (1993) (holding that a new claim of actual innocence is not grounds for federal habeas corpus relief); Coleman v. Thompson, 501 U.S. 722 (1991) (relying upon a procedural mistake to refuse the petitioner's procedurally defaulted habeas claims, despite the lack of a full and fair hearing on the merits of his appeal); Smith v. Murray, 477 U.S. 527 (1986) (failing to find a miscarriage of justice of petitioner's procedurally defaulted claims, leading to the petitioner's capital punishment notwithstanding a clear due process violation and evidence thereof).

[52] Margolis, *supra* note 1, at 590–92 (illuminating the mistaken federalism analysis by the Rehnquist Court, explaining that "[t]he co-equality of the branches of government does not have an equivalent 'separation of powers'; *within* the judiciary, federal and state."). Further, Margolis asserts that "[t]he *Sykes-Engle-Coleman* trilogy [the three Supreme Court cases largely responsible for a procedural narrowing of state prisoners' ability to have their habeas petitions reviewed in federal court] reflects more of a zealous attempt to reduce the burgeoning docket of habeas claims and appeals than a doctrinal analysis of Constitutional federalism. The Court's readiness to find grounds for abstention in the name of prismatic views of 'federalism' does not wash." *Id.* at 592. Thus, according to Margolis, the Burger-Rehnquist Court has limited the constitutional guarantee of federal habeas corpus without relying on any constitutional imperative, but

Finally, the Supreme Court noted, in an attempt to further rationalize closing the window on federal habeas review, that "[f]ederal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes."[53] The Court's jusitification here is starkly contrary to the constitutional guarantee of habeas corpus, and instead champions procedural pragmatism at the expense of the letter and spirit of the Constitution.[54] While these rationales may indeed be functional, federal courts have employed them to unduly limit the frequency with which federal habeas corpus petitions are reviewed, and to tip the balance from principle to practicality.[55] As I will describe, arbitration may be a means of allowing prisoners to effectively and efficiently have their petitions reviewed in federal court, while still satisfying these purported rationales.

B. *The Anti-Terrorism and Effective Death Penalty Act of 1996: Federal Habeas Restrictions, Codified*

While these aforementioned judicially-created procedural hurdles—largely initiated and implemented by the Burger-Rehnquist Court and maintained by lower federal courts—impose a complex web of obstructions in the way of state prisoners seeking to have proper federal review of habeas claims, Congress has also contributed to this procedural impasse. In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act

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instead relying on a faux rationale of federalism. *Id.* at 590–92. *But see* William J. Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 UTAH L. REV. 423 (1961) (arguing for a broad federal review of state habeas corpus petitions, suggesting that contrary to suggestions popular belief, the interplay between state and federal review of habeas petitions is in fact the ideal application of constitutional theories of federalism and comity).

[53] McCleskey v. Zant, 499 U.S. 467, 491 (1991).

[54] *See* Margolis, *supra* note 1, at 598 ("The responsibility of the federal courts is to apply the habeas corpus 'safeguard' against violations of the Constitution, federal law, and treaties. The Constitution says nothing about the 'costs' of safeguarding personal liberty."); *see also Coleman*, 501 U.S. at 758 (Blackmun, J., dissenting) (noting the majority's reliance upon procedural pragmatism in rejecting the petitioner's federal habeas claim, but arguing that "[o]ne searches the majority's opinion in vain, however, for any mention of petitioner Coleman's right to a criminal proceeding free from constitutional defect").

[55] *See Coleman*, 501 U.S. at 758–59 (Blackmun, J., dissenting) (referring to the procedural barriers that are anathema to the constitutional guarantee of habeas corpus review as a "[b]yzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights").

(AEDPA),[56] which, as detailed below, has reinforced the procedural hurdles and made their effect more prohibitive to those attempting to realize their constitutional guarantee of habeas corpus.

Several aspects of the AEDPA exacerbate the complexity of the procedural impediments to a prisoner's habeas review in federal court.[57] Specifically, the "gatekeeper provision" of the AEDPA—creating a mandatory block for second or successive habeas petitions of federal and state inmates—has supplemented the existing procedural barriers to access to federal review of habeas petitions.[58] Under the far-reaching language of the AEDPA, successive claims which may bring to light new challenges that could not have been raised earlier are precluded by the gatekeeper provision.[59] This provision has resulted in the removal of judicial discretion in regulating second or successive motions by prisoners, and thus further narrows individual access to habeas corpus.[60] The Supreme Court has

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[56] 28 U.S.C. § 2244(b)(2) (1996).

[57] *Id.* ("A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (B)(i) the factual predicate of the claim could not have been discovered previously through the exercise of due diligence; and (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.").

[58] *See generally* Deborah L. Stahlkopf, *A Dark Day for Habeas Corpus: Successive Petitions Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115 (1998) (providing a comprehensive analysis of the limiting effects that the AEDPA has on state prisoners attempting to have their habeas petitions reviewed in federal courts). Stahlkopf suggests that the AEDPA will engender an overbroad restriction on habeas corpus relief; an effect contrary to that which was envisioned by Congress in creating and enacting the AEDPA. *See generally id.*; *see also* Randal S. Jeffrey, *Successive Habeas Corpus Petitions and Section 2255 Motions After the Antiterrorism and Effective Death Penalty Act of 1996: Emerging Procedural and Substantive Issues*, 84 MARQ. L. REV. 43, 140 (2000) (observing that "the successive application provisions of the Antiterrorism and Effective Death Penalty Act of 1996 substantially changed both the procedures and substantive law governing successive § 2254 petitions and § 2255 motions in a manner that has engendered a host of issues").

[59] Stahlkopf, *supra* note 58, at 1135 (articulating the various constitutional implications presented by the AEDPA's gatekeeper provision, particularly submitting that the gatekeeper provision restricts an inmate's petition "*any* time there is a second claim involving the question of whether the petitioner received fair process—a fair trial, a fair sentencing, a fair appeal—where the new claim does not go to the guilt or innocence of the defendant").

[60] *Id.* at 1122.

accordingly recognized that "[i]f the prisoner asserts a claim that he has already presented in a previous federal habeas petition, the claim *must* be dismissed in all cases."[61]

Beyond the gatekeeper provision, the AEDPA also creates a statute of limitations for filing federal habeas petitions.[62] Prior to 1996 there had been no statute of limitations on habeas filings.[63] However, in an effort to expedite the filing of petitions, increase efficiency in court proceedings, and promote finality of judicial decisions, Congress implemented through the AEDPA a one-year statute of limitations during which habeas petitioners must file.[64] This rigid period for filing a habeas petition presents a distinct problem for federal courts that receive a claim that is not exhausted, or a mixed petition with both exhausted and unexhausted claims. If the federal court receives such a timely-filed petition but dismisses it as unexhausted after the limitations period of one year, it will permanently terminate that prisoner's opportunity for federal review.[65]

Much of the substance of the AEDPA, as it relates to federal habeas review, echoes the rights-restrictive approach of the Burger-Rehnquist Court regarding state prisoners.[66] As discussed above, federal courts have initiated and perpetuated inequities against prisoners' rights through an entanglement of procedural barriers.[67] The AEDPA further constricts accessibility to federal court for state prisoners with habeas petitions through rigid statutory language—notably the gatekeeper provision and the creation of a one-year

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[61] Tyler v. Cain, 533 U.S. 656, 661 (2001) (citing 28 U.S.C. § 2244(b)(1)) (emphasis added).

[62] 28 U.S.C. 2244 (d)(1).

[63] *See* Mayle v. Felix, 545 U.S. 644, 654 (2005) ("In enacting AEDPA in 1996, Congress imposed for the first time a fixed time limit for collateral attacks in federal court on a judgment of conviction.").

[64] 28 U.S.C. 2244(d), 2255 (2006); *see also* Blume, *supra* note 14, at 289 (noting that the statute of limitations has had a sweeping effect on the ability for state prisoners to have proper federal review of their habeas claims, and that preclusion of federal review for violation of the new statute of limitations is often "not necessarily the habeas petitioner's fault").

[65] Rhines v. Weber, 544 U.S. 269, 275 (2005); *see also* Charles Doyle, *Federal Habeas Corpus: A Brief Legal Overview* 20 (Congressional Research Service Report for Congress, April 26, 2006), *available at* http://www.fas.org/sgp/crs/misc/RL33391.pdf.

[66] *See* Blume, *supra* note 14, at 281 (analyzing arguments that the Supreme Court has been politically affected by the passage of the AEDPA, and asserting that the Court believes that "it is primarily [its] responsibility to say how much habeas is enough").

[67] *See* Berkowitz, *supra* note 27, at 516–17 (arguing that "habeas corpus jurisprudence has continually retreated from imagining habeas corpus as an extraordinary means for the doing of justice beyond the laws").

statute of limitations period for the filing of federal claims.[68] Indeed, purportedly due to pragmatic concerns such as the scarcity of judicial resources and the import of judicial economy, the Supreme Court and Congress have combined to formulate policy contrary to the constitutional guarantee of federal habeas corpus relief.[69] Thus, it is a constitutional imperative that a remedy to the federal habeas corpus process be created and implemented.[70]

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[68] 28 U.S.C. § 2244 (2006); *see also* Stephen B. Bright, *Is Fairness Irrelevant?: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of States Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1, 4 (1997) (noting that in addition to the AEDPA's gatekeeper provision, the Act imposes a statute of limitations on habeas petitions, and "[t]he Act also prohibits federal courts from granting habeas corpus relief unless the decision of the state court 'involved an unreasonable application of clearly established Federal law,' [and] severely limits when a federal court may conduct an evidentiary hearing").

[69] Indeed, there exists a relatively widespread suspicion of habeas claims within Congress and certain sectors of the federal judiciary. For an analysis of the political impetus for the narrowing of federal habeas corpus accessibility, see Berkowitz, *supra* note 27, at 483, 502–08 (observing that the Supreme Court and Congress have turned a collective "blind eye to claims of both substantive and procedural errors"). Further, in light of the Supreme Court's decisions in such cases as *Williams v. Taylor*, 529 U.S. 362 (2000) and *Wiggins v. Smith*, 539 U.S. 510 (2003), Berkowitz acknowledges that the AEDPA has not entirely limited the effectiveness of habeas corpus, but has nevertheless "put the Court in the awkward position of saying that certain kinds of errors are acceptable." *Id.* at 506. Thus, the establishment of an arbitral court specifically charged with broadly hearing federal habeas corpus claims could limit the future effect of the AEDPA upon the federal judiciary. Further, the federal judiciary has occasionally acknowledged the weakened habeas doctrine. In *Brecht v. Abrahamson*, 507 U.S. 619, 649 (1993) (White, J., dissenting) it was observed that

> [o]ur habeas jurisprudence is taking on the appearance of a confused patchwork in which different constitutional rights are treated according to their status, and in which the same constitutional right is treated differently depending on whether its vindication is sought on direct or collateral review. I believe this picture bears scant resemblance either to Congress' design or to our own precedents.

[70] *See* Bright, *supra* note 68, at 27 (arguing that a habeas review system without fairness "produces results—conviction and death sentences—but it does not produce justice"). Bright instead argues for a system that imparts paradigmatic fairness and justice into habeas corpus procedure by proper review and representation of the rights of poor and indigent individuals. *See generally id.*

III. WHY ARBITRATION?

The establishment of a federal arbitral tribunal, charged with the duty of reviewing federal habeas corpus petitions arising out of state court, and prior to their appeal to federal court, could potentially alleviate the federal docket and increase the availability of habeas review.[71] Indeed, lightening the caseload in federal courts would mitigate a strong justification used by federal courts and Congress in restricting the access of prisoners to federal habeas review: the scarcity of judicial resources.[72] Alternative dispute resolution methods have had a profound and positive effect in remodeling the methodology and practice of many areas of law and over many legal issues.[73] Thus, in the rights-restrictive arena of federal habeas corpus review as described above, it is feasible that a means of alternative dispute resolution could likewise be implemented in order to reinstate the Great Writ as a viable mechanism for achieving constitutional redress.[74]

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[71] *See* Burton v. Bush, 614 F.2d 389, 390 (4th Cir. 1983) (recognizing that the inherent purpose of arbitration is "speed, efficiency, and reduction of litigation expenses").

[72] *See* Margolis, *supra* note 1, at 594 (describing the current system of habeas corpus review at the federal level, and noting that the "highway leading to habeas relief, thanks to judicial activism . . . by the Burger-Rehnquist Court, has become a veritable minefield of procedural booby traps clearly intended to bar hearings on the merits"). Margolis emphasizes that the Court has used the scarcity of resources rationale to perpetuate this "minefield of procedural booby traps." *Id.* at 593–99; *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 250–58 (1973) (Powell. J., concurring). Justice Powell observed in *Schneckloth* that

> [judicial] resources are limited but demand on them constantly increases. There is an insistent call on federal courts both in civil actions, many novel and complex, which affect intimately the lives of great numbers of people and in original criminal trials and appeals which deserve our most careful attention. To the extent the federal courts are required to re-examine claims on collateral attack, they deprive primary litigants of their prompt availability and mature reflection. After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication.

Id. at 260–61. Justice Powell's concurrence in *Schneckloth* is "the most frequently cited for the 'scarcity of resources' rationale." Margolis, *supra* note 1, at 597.

[73] *See* Dunham, *supra* note 16.

[74] Berkowitz, *supra* note 27, at 482, 506, 517 (arguing, among other points, that though habeas corpus was envisioned as a "great writ," it "has not lived up to its promise as a sword of justice"). Berkowitz largely attributes the decline of habeas protection to the enactment of the AEDPA. With the continual implementation of such barriers, according to Berkowitz, "habeas corpus jurisprudence has continually retreated from

Alternative dispute resolution methods have been utilized for decades as efficient and enforceable techniques of settling legal claims and issues outside the courtroom.[75] Substantively, alternative dispute resolution methods are often utilized in an effort to evaluate the merit of constitutional claims, along with a wide array of other types of disputes, as noted below.[76] Insofar as federal habeas corpus review is concerned, alternative dispute resolution could certainly provide an effective mechanism for proper review of such claims.[77] Specifically, the establishment of a mandatory expert arbitral tribunal charged with exclusively hearing federal habeas corpus claims could serve a vital role in alleviating the procedural barriers that have been handed down by federal courts over the past four decades, and in mitigating the prohibitive effect of the AEDPA.[78]

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imagining habeas corpus as an extraordinary legal means for doing justice beyond the laws." *Id.* at 516–17.

[75] *See* Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-shaping our Legal System*, 108 PENN. ST. L. REV. 165, 166 (2003) (noting the profound effects of ADR methods in the American legal system, and observing generally that while alternative dispute resolution tactics have not replaced traditional litigation, "the ADR movement has had some success over the past twenty-five years in changing business and legal decision-makers' views of how best to resolve legal disputes"); Senator Charles E. Grassley & Charles Pou, Jr., *Congress, the Executive Branch, and the Dispute Resolution Process*, 1992 J. DISP. RESOL. 1, 6–7 (1992) (recognizing the growth and utility of alternative dispute resolution in American jurisprudence, and observing that "ADR has developed into a viable option for tens of thousands of disputants at the state and local level . . . " and, "[t]he fact that ADR has been such a benefit in the settlement of various disputes around the country points to its potential, and demonstrates that it is not some new high-risk technique but a viable option. . . ."). Grassley and Pou continue to note throughout the article the use of ADR over an array of substantive areas of law, and in a variety of tribunals at different levels of government. *See generally id.*

[76] Grassley & Pou, *supra* note 75, at 6 (additionally noting that "ADR is not only in the interest of government; it is also in the public's interest. Our society will fail to channel many regulatory and other decisions into new [alternative dispute resolution] processes at its peril.").

[77] *See, e.g.*, David A. Hoffman, *ADR: An Opportunity to Broaden the Shadow of the Law*, 21 HUM. RTS. Winter 1994 ,at 20 (asserting that "ADR has the potential to open the door to millions of Americans who currently cannot have their 'day in court' because both they and the judicial system lack the resources to proceed with litigation").

[78] *See* Antiterrorism and Effective Death Penalty Act of 1996, H.R. Conf. Rep. No. 104-518, at 111 (1996) (stating that AEDPA "incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases").

A. *Alternative Dispute Resolution: An Effective Means of Circumventing the Rigors of Traditional Adjudication*

Various methods of alternative dispute resolution have been implemented with notable effectiveness, and have succeeded in reforming the manner in which legal disputes are resolved in a number of areas of law.[79] ADR systems have been implemented by courts, corporations, and governmental entities, among others, as a means of streamlining the resolution of internal and external conflicts.[80] Further, federal statutes and acts have been created that mandate the use of alternative dispute resolution in certain areas of law.[81] ADR has become popular for a variety of reasons,[82] and the utility of alternative dispute resolution in various aspects of legal and governmental processes has been noted throughout a litany of case law at state and federal levels, and in a substantial amount of commentary.[83]

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[79] *See, e.g.*, Aric J. Garza, *Resolving Public Policy Disputes in Texas Without Litigation: The Case for Use of Alternative Dispute Resolution by Government Entities*, 31 ST. MARY'S L.J. 987, 995 (2000) (analyzing how alternative dispute resolution methods have been implemented in agency operations and public policy); Charles A. Schwartz, Comment, *Arbitration: An Alternative in the CAFTA Region and Beyond*, 12 SW. J. L. & TRADE AM. 425, 425–26 (2006) (observing the meaningfulness of arbitration in resolving commercial disputes); Evan J. Spelfogel, *Legal and Practical Implications of ADR and Arbitration in Employment Disputes*, 11 HOFSTRA LAB. & EMP. L.J. 247, 249 (1993–1994) (noting the practical necessity in applying alternative dispute resolution methods in employment disputes).

[80] *See, e.g.*, Garza, *supra* note 79; Spelfogel, *supra* note 79.

[81] *See, e.g.*, The Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–58 (1998) (requiring that all federal trial courts establish an alternative dispute resolution program); The Federal Arbitration Act of 1925, 9 U.S.C. §§1-307 (1925) (applying to both state and federal court, and promoting arbitration in lieu of litigation); and The Administrative Dispute Resolution Act, 5 U.S.C. § 571 (1996) (implementing arbitration procedures in administrative agencies, specifically finding that arbitration "can lead to more creative, efficient, and sensible outcomes").

[82] Robert E. Wells, Jr., *Alternative Dispute Resolution—What is it? Where is it Now?*, 28 S. ILL. U. L.J. 651 (2004) (identifying several benefits to utilizing ADR, including but not limited to lower attorney's fees, shorter hearings, limited pleadings and motions, higher accuracy in damage awards, quality of decisionmakers, and privacy). Additionally, Wells maintains that with ADR, "[p]arties maintain control over the structure of the process." *Id.* at 681.

[83] *See, e.g.*, Waller v. Daimler Chrysler Corp, 391 F. Supp. 2d 594, 601 (E.D. Mich. 2005) (acknowledging the inherent benefits of ADR); Ignazio v. Clear Channel Broadcasting, Inc., 113 Ohio St. 3d 276, 280 (Ohio 2007) (observing that "[t]he law favors and encourages arbitration as a means of resolving disputes"); *see also* Phillip M. Armstrong, *Why We Still Litigate*, 8 PEPP. DISP. RESOL. L.J. 379, 379 (2008) (observing that "America has embraced ADR," and that many companies in the United States

Given the rise of ADR throughout American law and society, and the heightened reliance upon its methods by attorneys, government agencies, corporations, and trial courts alike, it is apparent that the benefits of ADR are currently recognized on a comprehensive scale throughout the legal community.[84] Thus, given the frequency with which ADR is used in a wide range of legal areas,[85] it follows that for the purposes of reforming the federal habeas corpus review process, exploring the viability of using ADR proceedings to adjudicate habeas disputes is both timely and appropriate. In light of this exploration, as detailed below, a mandatory arbitration procedure[86] may be the most enforceable and efficient means of remedying the habeas corpus process, and deserves prospective attention regarding its application.

B. *The Case for Arbitrating the Great Writ*

The establishment of a mandatory arbitral process to review federal habeas petitions, administered by a panel of expert arbitrators, is a feasible and cost-effective prescription to redressing the flaws in the modern habeas doctrine.[87] Arbitration is a unique process, as it entails many of the informal

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recognize in ADR "the benefits of early case assessment, straightforward negotiation . . . and ADR to obtain significant cost savings and, frankly, more positive outcomes"); Grassley & Pou, *supra* note 75 (explaining various ways that alternative dispute resolution methods have been effective in governmental processes).

[84] *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626–27 (1985) (asserting that "we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhabited the development of arbitration as an alternative means of dispute resolution"); Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1312 (11th Cir. 2002) (recognizing that "arbitration agreements to resolve disputes between parties have now received near universal approval"); Wimsatt v. Superior Court, 61 Cal. Rptr. 3d 200 (Cal. Ct. App. 2007) (noting the utility of mediation in facilitating frank communication between parties, and upholding the confidentiality of the mediation at issue).

[85] *See* Grassley & Pou, *supra* note 75.

[86] 1 THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 1:7 (upd. Dec. 2008) (providing a comprehensive description of court-annexed arbitration). Oehmke notes several typical traits of court-annexed arbitration: 1) the federal goal of court-annexed arbitration is to relieve federal courts of the burdens of burgeoning litigation; 2) federal court-annexed arbitration is currently mandated by 28 U.S.C. 651, and requires that each federal district court appoint a judicial officer to oversee the process; and 3) a losing party in a court-annexed arbitration can appeal the result and demand a trial de novo.

[87] *See* Amy Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575, 636 (1993) (observing problems with federal court habeas corpus doctrine, and asserting that the "Supreme Court is intent upon enlarging the gap between constitutional right and

and flexible qualities of ADR methods while providing the involved parties with binding and authoritative decisions.[88] Further, arbitration has become a highly-utilized and effective means of resolving disputes over a comprehensive array of legal issues, yet remains respected as a legitimate and binding process that can create workable and enforceable results.[89]

Indeed, commentary and studies observing arbitration's effects on the legal practice, and its prominence in resolving disputes, have become more commonplace and increasingly supportive of the insertion of arbitration procedures into American jurisprudence. A considerable number of studies and comparative research have been disseminated evaluating the effectiveness of arbitration versus that of litigation. These studies have largely found that arbitration has the capacity to produce comparable—and at

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remedy," and that the Court's method of review "is more likely to ignore errors that occur by way of random official illegality, as opposed to those that occur by legislative action or by executive pattern and practice"). Given arbitration's hybrid characteristic encompassing both flexibility as well as legal enforceability of agreements, it certainly fits this mold.

[88] Arbitration generally offers the speed, economy, and privacy of other alternative dispute resolution methods such as mediation and negotiation, while allowing for "traditional" qualities of litigation, such as witness testimony, discovery, and evidence disclosure. *See* Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993) (recognizing the "twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation"); Rodriguez v. Windermere Real Estate/Wall Street, Inc., 175 P.3d 604, 608 (Wash. App. 2008) ("Arbitration serves as a beneficial alternative to litigation that can provide a more expeditious and less expensive resolution of disputes."); *Ignazio*, 113 Ohio St. 3d at 280 ("There is a strong presumption in favor of arbitration, and any doubts should be resolved in its favor.").

[89] *See* Southland Corp. v. Keating, 465 U.S. 1, 12 (1984) (holding that with the passage of the Federal Arbitration Act (FAA), arbitration decisions were henceforth to be binding upon all courts, and that in passing the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration"). For commentary on the rise of arbitration in American courts, see Dunham, *supra* note 16, at 227 (observing that "*Southland's* progeny are continuing to define the length and width of arbitration's reach under the FAA"). Dunham notes that since the Court's judicial definition of the effect of the FAA in *Southland*, arbitration has become a judicial preference, and under the Federal Arbitration Act, the federal courts have begun to create a common law of arbitration. Further, Dunham insists that the courts are continuously discovering the possibilities that arbitration possesses. *See generally id.*; *see also* Terenia Urban Guill, Comment, *A Framework for Understanding and Using ADR*, 71 TUL. L. REV. 1313, 1313 (1997) (noting that arbitration is "the darling of the legal system" and promoted with "gushing enthusiasm" by courts at all different levels). Guill additionally notes that the Supreme Court has expressly indicated its policy in favor of arbitration on both international and domestic fronts. *Id.* at 1316.

times superior—results to litigation. For example, when comparing the arbitration and litigation of similar construction disputes, one attorney observed that while the results in the two cases were largely the same, "[a]rbitration led to a resolution in much less time overall and allowed the parties to customize the process to a complex construction case."[90] An empirical study of the results of employment litigation versus employment arbitration found "no statistically significant differences between employee win rates or in the median or mean awards in arbitration and litigation."[91] While these studies are just two examples among many which illuminate arbitration's usefulness as compared to litigation, they indicate the fairness that arbitration engenders as a mode of resolving legal disputes.[92] If the arbitration of construction and employment cases can have similar or superior results as compared to litigation, it follows that arbitration can be a viable means of dispute resolution in other complex areas of law.

The question therefore arises: if arbitration is an effective and economical means of resolving disputes in a variety of areas of law, can

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[90] Jeffrey R. Cruz, *Arbitration vs. Litigation: An Unintentional Experiment*, 60 DISP. RES. J. 10 (Jan. 2006). Further, Cruz notes that "[t]he [arbitration] proceedings were made more efficient because arbitration, unlike litigation, allows flexibility in scheduling hearings, organizing the evidence, and presenting witness testimony." *Id.* at 16.

[91] Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RES. J. 44, 44 (Nov. 2003–Jan. 2004).

[92] For further reading comparing arbitration to litigation, and suggesting that arbitration can be an advantageous model of dispute resolution for parties, see Peter B. Rutledge, *Arbitration—A Good Deal for Consumers*, U.S. CHAMBER INST. FOR LEGAL REFORM (2008) (noting that empirical research of arbitration finds, among other data, that arbitration improves access to courts, is more protective of individual rights than litigation, delivers results and rewards at a faster pace than litigation, and costs such as attorneys' fees are often far lower than in litigation); Mark Fellows, *The Same Result as in Court, More Efficiently: Comparing Arbitration and Court Litigation Outcomes*, THE METROPOLITAN CORPORATE COUNSEL, July 2006, at 32 (concluding that arbitrations are demonstrably more efficient than litigation, and that in general, the results and resolutions of arbitration do not substantively vary from litigation, thus refuting the claim that parties are not adequately protected in arbitration proceedings); Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L REV. 761 (2003) (highlighting studies that indicate the fairness of the arbitration process, and its protection of individual rights); *Arbitration: Simpler, Cheaper, and Faster than Litigation*, Binding Arbitration Study, conducted by the Harris Poll, *available at* http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/2005HarrisPoll.pdf (observing and articulating the results of the study, in that "[a]rbitration is seen as widely faster (74%), simpler (63%), and cheaper (51%) than going to court"). Further, the Harris Poll's Binding Arbitration Study synthesizes and disseminates statistics derived from the opinions of a number of consumers and corporations alike on the fairness of the arbitral process. *Id.*

federal habeas corpus disputes be resolved through arbitration as well? As noted above, the answer is "yes": arbitration would provide a viable alternative to the often costly—in terms of dollars as well as constitutional rights—trial review of federal habeas petitions.[93]

C. *A Comparative Study of Various Arbitration Models*

In proposing a workable model of arbitration for resolving federal habeas corpus disputes, particularly successful and analogous aspects of other arbitration models can provide valuable guidance.[94] Certainly, a habeas arbitration model need not be devised out of thin air, and therefore will incorporate successful and workable aspects of other established and proposed arbitration systems.

The American Arbitration Association (AAA)—an influential and prominent administrator of multiple dispute resolution services nationwide[95]—has established a traditional model of arbitration, which in turn is frequently used by the AAA in a variety of different disputes. The traditional arbitration method is the AAA's base model of arbitration.[96] This system relies primarily upon subject matter experts as arbitrators, flexibility in proceedings, and confidentiality.[97] Additionally, AAA arbitration awards

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[93] *See* Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 958 (1998) (postulating that the Supreme Court's limitation of the federal habeas corpus remedy was largely based upon "a policy assessment that the cost of granting relief in such cases exceeds the benefit"). Thus, based upon Scheidegger's assessment, if these costs were curtailed by an arbitral system in place of direct trial review of habeas petitions, it follows that these judge-created limitations may lose effectiveness in federal habeas adjudication. *See also* Margolis, *supra* note 1, at 599 ("The responsibility of the federal courts is to apply the habeas corpus 'safeguard' against violations of the Constitution, federal law, and treaties. The Constitution says nothing about the 'costs' of safeguarding personal liberty.").

[94] Indeed, this note derives much of its analysis of the utility of particular facets of the proposed arbitral habeas court from already established arbitration models. As noted throughout, arbitration systems have been successfully devised and used throughout a number of legal areas. *See* National Arbitration Forum, http://www.adrforum.com /faq.aspx?faq=884 (last visited Feb. 25, 2010) ("Just about any type of dispute can be arbitrated, including contract disputes involving businesses and consumers, intellectual property disputes, employment and labor claims, real estate and construction issues, and tort and civil rights matters.").

[95] American Arbitration Association, About Us, http://www.adr.org/about (last visited Jan. 12, 2010).

[96] *See generally* American Arbitration Association, Introductory Guide, http://www.adr.org/si.asp?id=3932 (last visited Jan. 12, 2010).

[97] *Id.*

are "binding and legally enforceable, subject only to limited review by the courts."[98]

Several arbitration models—established and proposed—have advocated and used a non-consensual, mandatory approach to arbitration, rather than a purely voluntary approach.[99] In various employment arbitration systems, for example, mandatory arbitration has been found to provide parties with sufficient legal protection, flexibility, and binding resolutions to disputes.[100] The growth of mandatory arbitration has been significant over the past years, as industries and businesses have recognized the mandatory arbitration process as expedient, cost-effective, and legitimate.[101]

Several arbitration models also have implemented standards of review that courts would have over arbitration proceedings.[102] Indeed, both legal commentators and the Supreme Court have suggested that federal judges should have only have limited review of an arbitration proceeding, pursuant to an appeal from the arbitration.[103] A "court-free" model only allows arbitral

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[98] *Id.*

[99] *See* Gilles Cuniberti, *Beyond Contract—The Case for Default Arbitration in International Commercial Disputes*, 32 FORDHAM INT'L L.J. 417, 480–81 (2009) (proposing a model for arbitrating international commercial disputes). Specifically, Cuniberti's mandatory arbitration model would require that courts can have appellate review over the fairness of process, but would not have review of the merits of an arbitral award. *Id.* at 481.

[100] *See* Michael H. LeRoy, *Getting Nothing for Something: When Women Prevail in Employment Arbitration Awards*, 16 STAN. L. & POL'Y REV. 573, 599 (2005) (concluding, after substantial empirical research on employment arbitration and the effects of gender upon arbitration awards, that "current forms of mandatory arbitration provide a remarkable range of alternative civil justice procedures for employees," and noting that the main flaw with mandatory arbitration—and arbitration as a whole —is questionable judicial review at the federal level).

[101] Jeffry W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383, 435 (2008) (observing that "industries widely using mandatory arbitration (e.g., credit cards) have seen growth rates equal to or exceeding overall economic growth"). Stempel supplements this observation by noting that there is little evidence that mandatory arbitration clauses affect the decisions of consumers.

[102] *See* Cuniberti, *supra* note 99, at 480.

[103] Michael H. LeRoy & Peter Feuille, *As the Enterprise Wheel Turns: New Evidence on the Finality of Labor Arbitration Awards*, 18 STAN. L. & POL'Y REV. 191, 219 (2007) (observing trends in the labor arbitration movement and suggesting that "federal judges play only a cameo role in the overall functioning of the nation's labor arbitration system"); *see also* Eastern Associated Coal Corp., AFL-CIO v. United Mine Workers Dist. 17, 531 U.S. 57, 62 (2000) (asserting that "as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that 'a court is convinced he committed serious error does not suffice

awards to be reviewable upon appeal for particularly egregious procedural errors and missteps, as opposed to the substantive merit of the legal claims of the respective parties.[104] This court-free arbitration model is generally viewed as legitimizing the arbitration process and recognizing that arbitration is a judicially-supported mode of resolving disputes without judicial control and micromanagement of the process.[105]

Previously established and proposed models also stress the importance of having a publicly transparent process, in which the public interest is protected, accountability is valued, and norms are established.[106] For example, arbitrations conducted by the New York Stock Exchange require full public disclosure and written rewards.[107] Likewise, the International Chamber of Commerce publishes all arbitration awards taking place within its arbitration court with the consent of the involved parties.[108] In that same vein, it has been proposed and suggested that arbitral systems resolving disputes rooted in public rights and interests should have transparency at their forefront.[109]

Lastly, many arbitration models have the ideas of institutionalism and expertise as fundamental aspects of their particular systems. The North American Free Trade Agreement's (NAFTA) arbitration model is a prime

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to overturn his decision'") (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)).

[104] Cuniberti, *supra* note 99, at 481.

[105] *See* Weeks v. Harden Mfg. Corp., 291 F.3d 1307, 1312 (11th Cir. 2002) (recognizing that "arbitration agreements to resolve disputes between parties have now received near universal approval"); *see also* Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576, at syllabus (2008) (recognizing the "national policy favoring arbitration with just the limited review needed to maintain arbitration's central virtue of resolving disputes straightaway").

[106] Transparency of arbitration dispositions is not the norm for arbitral tribunals. However, given the unique nature of habeas claims and the fundamental rights at issue, it may be useful to look outside the typical confines of arbitration and publicly disseminate such decisions.

[107] New York Stock Exchange Dep't of Arbitration, Article XI NYSE Constitution and Arbitration Rules, R. 627 (June 2003), *available at* http://www.nyse.com/pdfs/Rules.pdf.

[108] *See* International Court of Arbitration website, http://www.iccwbo.org/index_court.asp (last visited Feb. 25, 2010).

[109] *See, e.g.*, Dora Marta Gruner, *Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform*, 41 COLUM. J. TRANSNAT'L L. 923 (2003) (suggesting that when the public interest is involved in the arbitration procedure, many institutions have begun disclosing arbitration awards to the public, and that in such arbitration systems, a modicum of transparency should be inserted into the process).

example of institutionalism in resolving disputes.[110] NAFTA's institutionalized process establishes detailed procedures governing arbitration, and imposes restrictions on who can serve on the arbitration panel. In particular, NAFTA requires that their arbitral judges have expertise in international trade, or in the dispute arising under the international trade agreement.[111] The AAA's traditional arbitration system, for example, staffs over 8,000 arbitrators who are experts in their respective fields.[112] Likewise, it has been suggested that ad hoc, un-institutionalized arbitration systems—such as the system utilized by the World Trade Organization—may be subject to a lack of expertise in the proceedings, thereby compromising the legitimacy and effectiveness of the process.[113]

D. *A Proposed Model of Federal Habeas Corpus Arbitration*

If an alternative dispute resolution method is to be successful in its application to federal habeas corpus review, its decisions must be binding and enforceable, and the arbitral process must be legitimate and fair.[114] Indeed, though arbitral judgments in this system should be appealable to

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[110] *See* Model Rules of Procedure for Chapter Twenty of the North American Free Trade Agreement, *available at* http://www.nafta-alena.gc.ca/en/view.aspx?conID=657&mtpiID=ALL (outlining the provisions and procedures that define NAFTA's arbitration process).

[111] *See* David Livshiz, *Public Participation in Disputes Under Regional Trade Agreements: How Much is Too Much—The Case for a Limited Right of Intervention*, 61 N.Y.U. ANN. SURV. AM. L. 529, 548 (2005) (providing details on several institutionalized arbitral systems, including NAFTA's, and explaining how the formality of the procedures within these systems have affected international trade agreements).

[112] American Arbitration Association, *supra* note 96 ("The 'subject matter expertise' of the neutral reduces the time typically required to attempt to educate the judge or jury about the technical elements of a dispute, and raises the confidence level of the parties that the result of the process will be well-informed.").

[113] *See* Linda Silberman, *International Arbitration: Comments from a Critic*, 13 AM. REV. INT'L ARB. 9, 17 (2002) (suggesting that "a system of *ad hoc* panels leaves open concerns about expertise," and "does not offer the most favorable conditions for the development of and adherence to established legal norms").

[114] *See generally* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986) (recognizing the concerns about the widespread use of ADR—for example, that public values will be underappreciated in ADR results, and that judgments facilitated by an ADR process will not entail a sufficient level of fairness—and determining that in order for ADR to be workable on a large scale across American jurisprudence, it must be fair and just, must provide the public with an appearance of propriety in judgment, and must operate within the framework of the rule of law).

federal court for limited review, in order for the system to be legitimate, it must provide constitutionally sound judgments and issue binding dispositions.[115] Further, the arbitral process must preempt the use of the various procedural barriers implemented by the Burger-Rehnquist Court.[116] In creating and implementing an effective arbitral tribunal to review federal habeas corpus claims, it is important and useful to apply the more workable and practicable attributes of those arbitral models already established and functioning within the American legal system.[117]

This proposed arbitral model of federal corpus review has four principal components, detailed below: (1) it will act as a *mandatory* first step for appeals of habeas review by state prisoners, or for direct habeas review by federal prisoners; (2) it will consist of a set of expert arbitral judges with a specialization in complex constitutional issues, and/or the prisoners' rights issues that inform proper habeas corpus analysis; (3) decisions should be publicly disclosed and transparent, given the public interest in civil rights; and (4) decisions from this arbitral body will be appealable to federal district courts of proper jurisdiction, for limited review over procedural and constitutional validity.

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[115] *See* Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51, 72 (2003) (discussing the many factors that legitimize the judicial process. In particular, Sturm notes that "[t]he judicial process builds in a variety of decision points that invite less binding norm elaboration"). Sturm also notes that the values affecting due process are "participation, information generation, and effective problem solving." *Id.* Per Sturm's insightful look into the dynamics that affect legitimate judicial decisionmaking, if an arbitral system for federal habeas review were to obtain legitimacy, it would have to build upon norms and incorporate the aforementioned values affecting due process.

[116] Hoffstadt, *supra* note 9, at 954 (attributing the rescinding of the constitutional guarantee of federal habeas corpus review to the Supreme Court's creation of "several doctrines that regulate habeas procedure or otherwise affect the legal or practical availability of the writ"); Margolis, *supra* note 1, at 566–80 (providing a chronological and detailed account of the "evisceration of federal habeas corpus jurisdiction") (citing Stone v. Powell, 428 U.S. 465, 503(1976) (Brennan, J., dissenting)).

[117] See *infra*, Part III. C. for a listing of several established arbitration systems, as well as arbitration models proposed by legal scholars and commentators, from which a nexus can be formulated between established systems and the model proposed to resolve federal habeas disputes.

1. *A Mandatory First Step*

Mandatory arbitration has many advantages, and would be a key facet of the arbitral model suggested in this note.[118] Indeed, in order to legitimize the process in lieu of federal district court review while relieving the federal district courts from the overwhelming amount of habeas claims introduced, an initial mandatory arbitral review of federal habeas claims is essential. Although the Supreme Court has maintained that "[c]onventional notions of finality in litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged,"[119] any judicial concerns about enforceability of judgment and finality would nevertheless be quelled by a mandatory arbitration system, which could provide an out-of-court review of final state determinations.[120] The arbitration judgments would then be appealable to federal district court for a limited review of the procedural soundness of the arbitration proceeding, thereby ensuring that prisoners' rights are fully protected.

Further, the Supreme Court has noted the legitimacy of mandatory arbitration procedures, and recognized their efficacy and enforceability under the Federal Arbitration Act.[121] Therefore, because the arbitration tribunal—as opposed to federal judicial courts—would be charged with processing and resolving the bulk of the federal habeas petitions, any concerns of federal courts superseding or disregarding state procedural doctrine may be largely

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[118] Lucy V. Katz, *Compulsory Alternative Dispute Resolution and Voluntarism: Two-Headed Monster or Two Sides of the Coin?*, 1993 J. DISP. RESOL. 1, 51 (observing that for routine claims [such as habeas corpus] mandatory arbitration is commonly imposed). While the prudence and appropriateness of mandatory alternative dispute resolution in certain situations has been questioned, that debate is not necessary for the purposes of this paper. This paper only seeks to suggest the viability of mandatory arbitration of habeas claims, which should merely be a starting place for weighing the pros and cons of such a system.

[119] Sanders v. United States, 373 U.S. 1, 8 (1963).

[120] *See* Hoffstadt, *supra* note 9, at 969 (noting that much of the limitation of state prisoners' access to federal habeas review is supported by the federal judiciary's insistence on the importance of state sovereignty, and finality of state procedural rulings). Thus, it stands to reason that if arbitration of habeas claims was to be viewed as an intermediary between the state process, and, if necessary, federal review, the strength of this concern could be diluted. *See also* Cuniberti, *supra* note 99, at 481 (submitting that "arbitral tribunals usually offer the protection and the process as adequate as those offered by the courts").

[121] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) (recognizing the benefits of enforcing arbitration agreements in employment contracts, and holding that mandatory arbitration agreements are enforceable under the FAA).

alleviated.[122] Federal courts, given the stringent standard of reviewing arbitration awards asserted by the Supreme Court,[123] would be removed from direct review of state procedural rulings, thereby negating any concerns of usurpation of state sovereignty and satisfying the considerations of federalism that have manifested themselves in the "procedural thicket."[124]

2. *A Panel of Experts*

Analysis of federal habeas corpus, and the procedural doctrine that informs such analysis, is a complex weave of statutory guidelines, judicial precedent, and public policy considerations.[125] Indeed, federal habeas corpus has been observed as being "one of the most complex areas of American law."[126] Therefore, in order to assure proficient review of these often complex claims, a panel of experts should act as arbitral judges to review the federal habeas petitions arising out of state court.[127] As noted above, expert panels have been successfully utilized as part of arbitration proceedings over other areas of law, in which the complexity of the claims was substantial.[128]

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[122] *See generally* Coleman v. Thompson, 501 U.S. 722 (1991) (emphasizing that federal courts owe deference to the procedural rulings of states).

[123] Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 62 (2000) (asserting that "as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision'") (quoting United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987)).

[124] Hoffstadt, *supra* note 9, at 954.

[125] *See* Emily Garcia Uhrig, *A Case for a Constitutional Right to Counsel in Habeas Corpus*, 60 HASTINGS L.J. 541, 544 (2009) (noting the "complexity of habeas corpus").

[126] Holmes v. Buss, 506 F.3d 576, 579 (7th Cir. 2007).

[127] *See* American Arbitration Association, *supra* note 96 ("The 'subject matter expertise' of the neutral reduces the time typically required to attempt to educate the judge or jury about the technical elements of a dispute, and raises the confidence level of the parties that the result of the process will be well-informed.").

[128] Edwards, *supra* note 114, at 681 (observing that methods of alternative dispute resolution can be effectively utilized in areas where "we can capitalize on the substantive expertise and standards" developed within a particular field). Edwards uses the example of labor and commercial arbitrators—and the respective expertise that these arbitrators have developed—and suggests that these individuals will help to effectuate an effective and efficient mechanism for resolving disputes in lieu of litigation. It is this kind of expert arbitration, according to Edwards, that can be transferred to other areas of law. Indeed, Edward suggests that "arbitration could prove useful in moderating disagreements between citizens, in resolving grievances of citizens against social service

The panel of experts operating a federal habeas arbitration system will foster efficiency and expeditious processing and resolution of petitions.[129] This facet of the federal habeas corpus arbitration model addresses concerns over scarcity of resources,[130] as the implementation of this arbitral system will greatly relieve the dockets of federal courts while proficiently analyzing complex habeas claims in a cost-effective manner.[131] Indeed, employing expert arbitrators will remove the burden of reviewing these claims from the shoulders of federal judges and will streamline these claims to a panel of experts whose sole focus will be on resolution of habeas disputes.

3. *The Importance of Transparency*

One of the most frequent criticisms of modern federal habeas corpus doctrine is that it largely operates at the expense of the constitutional and civil rights which are so highly valued by the public.[132] Because public rights will be at the center of the analysis performed by this arbitral body, public disclosure of the awards should be mandated so as to generate accountability and public trust in the system.[133] Moreover, because "the public interest

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agencies, and in resolving complaints of prisoners over conditions of confinement." *Id.* at 681–82.

[129] *See* Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 337, 371 (2007) (noting that an arbitrator with expertise or experience in a specific area of law can make an arbitration process more efficient, and that parties will not have to expend as many resources educating the arbitrator on the finer points of the law); Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123, 176 (2005) (asserting that "the complex nature of many claims suggests arbitrations can be handled more efficiently with some semblance of a motion practice handled by decisionmakers with both procedural and substantive expertise").

[130] *See* Schneckloth v. Bustamonte, 412 U.S. at 250–58 (Powell. J., concurring) ("To the extent the federal courts are required to re-examine claims on collateral attack, they deprive primary litigants of their prompt availability and mature reflection.").

[131] *See* THOMAS E. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 2 (3d ed. 2002) ("[Arbitration] functions as an alternative to judicial litigation by providing binding determinations through presumably less expensive, more efficient and expert, and nonetheless fair proceedings.").

[132] *See generally* Uhrig, *supra* note 125 (arguing that the modern doctrine of federal habeas corpus, and the review of habeas claims at the federal level pursuant to this doctrine, ignores the Equal Protection and Due Process rights of indigent and *pro se* petitioners, and that federal habeas needs to be reconstructed to ensure proper consideration of fundamental civil rights).

[133] *See* Gruner, *supra* note 109 (suggesting that when the public interest is involved in the arbitration procedure, many institutions have begun disclosing arbitration awards to

strongly favors vigorous application of the writ of habeas corpus,"[134] an arbitral tribunal reviewing federal habeas claims should hold transparency and public accountability in high regard, and should regularly enter its resolutions and rulings into a publicly-disseminated registry or bulletin, available online and in print for the interested public.

4. *Limited Oversight by the Federal Judiciary*

Finally, in order to comport with concerns of finality and binding resolution of disputes, the federal judiciary would have only limited review of the arbitration decisions formulated by the habeas arbitral court.[135] The scope of review of the federal judiciary would encompass procedural error during the arbitration process, and would seek to ensure that petitioners' rights were protected throughout.[136] Per the Supreme Court's instruction in *Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*,[137] federal review of the arbitration court's ruling should be very loose, and substantial deference should therefore be given to the arbitral court's decision.[138] Again, this facet of the federal habeas arbitral body directly addresses the concerns about federalism, comity, and the interrelationship of federal and state habeas review.[139]

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the public, and that in such arbitration systems, a modicum of transparency should be inserted into the process).

[134] Omar v. Harvey, 416 F. Supp. 2d 19, 21 (D.D.C. 2006).

[135] This aspect of the federal habeas arbitral model would largely mirror the arbitration system that governs labor disputes. *See* LeRoy & Feuille, *supra* note 103, at 219 (claiming that "federal judges play only a cameo role in the overall functioning of the nation's labor arbitration system").

[136] *See* Cuniberti, *supra* note 99, at 481 (arguing that because arbitration is a preferred mode of dispute resolution, it should prevent any court from deciding the case). Further, Cuniberti claims that given the legitimacy of arbitral tribunals, courts can sanction the procedure of the arbitration, but cannot review an arbitration decision on the merits.

[137] Eastern Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57 (2000).

[138] *Id.* at 62.

[139] *See* Margolis, *supra* note 1, at 590–92 (observing the Burger-Rehnquist Court's justification for is rescission of habeas corpus liberalism as rooted in concerns for federalism).

IV. CONCLUSION

The Great Writ is no longer fulfilling its vital role as prescribed in the United States Constitution. Instead, the Great Writ has regressed into a truism: an opportunity for redress that is sound in theory but complex, burdensome, and muddled in practice. Over the past few decades, the Burger-Rehnquist Court's habeas corpus jurisprudence has instituted a maze of obstacles between a state prisoner and federal review of his habeas claim. Moreover, Congress has reinforced and exacerbated the effect of these judicially-created barriers with the passage of the particularly rights-restrictive AEDPA of 1996.

As a prescription to the modern habeas malady, a court-annexed mandatory arbitration model could provide a viable forum for reviewing petitions for habeas corpus arising out of state court. This arbitral body would be efficient, fair, binding, and expert, and would provide considerable respite for the flooded dockets of the federal judiciary. Moreover, given the profound effects that the rise of ADR has had in a number of legal areas, and in society in general, there is no indication that ADR methods cannot be applied to the problematic doctrine of federal habeas corpus. If constitutional liberties are to be vigorously preserved by our federal judiciary, implementing an effective and equitable arbitration system to review federal habeas claims would be a crucial step towards restoring the Great Writ and fulfilling its constitutional guarantees.